SUPREME COURT OF THE UNITED STATES

No. 93–7054 (5)

BRUCE EDWIN CALLINS, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 22, 1994]

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, concurring.

JUSTICE BLACKMUN dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered," *post*, at 22, is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

As JUSTICE BLACKMUN describes, however, over the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: the sentencer's discretion to impose death must be closely confined, see *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), but the sentencer's

discretion *not* to impose death (to extend mercy) must be unlimited, see *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). These commands were invented without benefit of any textual or historical support; they are the product of just such "intellectual, moral, and personal" perceptions as JUSTICE BLACKMUN expresses today, some of which (*viz.*, those that have been "perceived" simultaneously by five members of the Court) have been made part of what is called "the Court's Eighth Amendment jurisprudence," *post*, at 7.

Though JUSTICE BLACKMUN joins those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett-Eddings* lines of jurisprudence, see *Graham* v. *Collins*, 113 S. Ct. 892, 910–911 (1993) (THOMAS, J., concurring); *Walton* v. *Arizona*, 497 U. S. 639, 656–673 (1990) (SCALIA, J., concurring in part and concurring in the judgment), he unfortunately draws the wrong conclusion from the acknowledgment. He says:

> "[T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution." *Post*, at 19.

Surely a different conclusion commends itself—to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong.

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's

views upon the people. JUSTICE BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which JUSTICE BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which JUSTICE BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum* v. *North Carolina*, No. 93–7200, cert. now pending before the Court. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.